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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of
Commission's Equal Employment
Opportunity Rules

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) MM Docket No. 94-34
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)

To the Commission:

COMMENTS

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SUMMARY OF COMMENTS

The Commission's EEO Rules have thus far been extremely effective in enhancing broadcast industry employment opportunities for members of minority groups and women. There is no evidence of widespread discrimination within the broadcast industry or of extensive but undetected violations of Commission EEO rules. The Commission thus should concentrate its future regulatory efforts in positively facilitating compliance with its EEO rules rather than continuing its current mechanistic and penal regulatory environment.

Recruitment. The Commission should assist in compilation of information concerning effective EEO recruitment sources. Its current requirement that licensees contact minority- and female-specific organizations, most of which are not employment-oriented, conflicts with practical reality.

Small and small market stations. Commission enforcement policies should recognize the practical difficulties faced by small and small market stations in recruiting, hiring and retaining qualified minority and female employees. Such stations must compete not only with larger broadcast stations for such employees but also with larger non-broadcast companies, all of which are generally able to offer better wages and benefits. Moreover, given the demand for qualified minorities and women within the broadcast industry, small stations often expend substantial resources on training, only to have employees move on to positions in larger markets.

The Commission should recognize these difficulties by establishing different compliance and enforcement standards for small and small market stations.

Labor Force Statistics. The Commission should abandon its wooden reliance on the MSA as a measure of the relevant labor force and permit stations to rely on the labor force within their actual service areas. This enforcement standard would be consistent with the programming-based justification for the agency's EEO rules.

Further, the Commission should follow the Supreme Court in accepting refined labor force statistics which reflect the actual qualifications of minorities and women within the labor force.

Significant Minorities. The Commission should consider stations' employment of all members of minority groups rather than focusing solely on "significant" minorities. Equal employment obligations are, or should be, intended to benefit all minorities, not just those which are present in large numbers.

Parttime Employees. The Commission should delete the requirement that extensive and expensive EEO outreach be undertaken for each parttime position which occurs at a station. However, stations which employ minorities and women on a parttime basis should be able to rely on their record in this regard as evidence of compliance with the Commission's EEO rules and policies.

Expanded EEO Enforcement. The Commission may not impose additional EEO-based requirements on television stations. Quite apart from this statutory prohibition, it would be unwise and improper for the Commission to expand its current EEO regulations. The Commission is a communications regulatory agency, whose jurisdiction and expertise do not extend to employment-related matters. Other federal, state and local agencies are expressly charged with EEO enforcement responsibilities.

Additional Commission regulation in this area would not only be wastefully duplicative: it would needlessly overburden its already obviously over-extended

EEO staff. The Commission should focus on making its existing EEO regulations more effective, not seek to expand them to encompass additional ancillary areas.

License Renewal Application. The Commission should not change its current license renewal application form. There has been no showing that such changes are necessary, and the additional information which would be required to be assembled, submitted and, most significantly, reviewed by the Commission's staff, would not add to the existing effectiveness of the Commission's EEO rules.

The Commission should, however, clarify certain of its existing requirements, including definition of the terms "referral," "applicant" and "interviewee," and explanation of the appropriate handling and reporting of situations in which licensees receive numerous unsolicited resumes either in response to advertisements or with no outside solicitation.

Annual Employment Report. There is no need to modify the current Annual Employment Report other than to delete the requirement that parttime employees be reported.

Inquiry Letters. The Commission should continue its present practice with respect to inquiry letters. If it believes that information for a period longer than the three year period now used would be useful to its enforcement efforts, it can ask for additional data in individual

circumstances. A possible need for more data in exceptional situations should not, however, prompt an across-the-board change in current reporting practices.

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To the Commission:

The law firm of Dow, Lohnes & Albertson
["DL&A"]^{1/} submits herewith its Comments on the
Commission's Notice of Inquiry in the above-captioned
proceeding insofar as the NOI relates to EEO practices of
broadcast licensees.^{2/}

The NOI marks the Commission's most recent rulemaking action in its multi-decade regulation of broadcast stations' equal employment opportunity practices. The Commission's regulatory activity in this area dates to 1968, when it instituted rulemaking proceedings^{3/} which led

3/ Notice of Proposed Rule Making, Docket No. 18244, 13
FCC 2d 766 (1968).

to rules forbidding discrimination in licensees' employment practices and requiring licensees to establish EEO Programs,^{4/} followed by additional rules requiring formal written EEO Programs and Annual Employment Reports (FCC Forms 395).^{5/}

These early EEO rules were clarified and strengthened in 1976, when the Commission substantially revised and expanded its EEO Program requirements, including a specific suggested Model EEO Program.^{6/} The Commission's current EEO rules were adopted in 1987.^{7/} The NOI seeks

4/ Report and Order, Docket No. 18244, 18 FCC 2d 240 (1969).

5/ Report and Order. Docket No. 18244, 23 FCC 2d 430 (1970) ["1970 Report"], recons. denied, 25 FCC 2d 780 (1970). Although these initial actions were limited in their primary scope to assuring equal employment opportunity for members of racial and ethnic minority groups, the Commission's rules and requirements were subsequently amended to specifically include women within the scope of their protection. Report and Order, Docket No. 19269, 32 FCC 2d 708 (1971).

6/ Report and Order, Docket No. 20550, 60 FCC 2d 226 (1976) ["1976 Report"], set aside in part, Office of Communication of United Church of Christ v. FCC, 560 F.2d 679 (2d Cir. 1977).

7/ Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, 2 FCC Rcd 3967 (1987) ["1987 EEO Report"], pet. for recons. pending. A decision in this proceeding would afford an appropriate opportunity to resolve the outstanding petitions for reconsideration of the 1987 EEO Report as well as to rule on the various petitions which have been filed seeking reconsideration or clarification of the Commission's recent 1994 Policy Statement. Standards for Assessing Forfeitures for

(continued...)

comments as to the effectiveness of those rules and suggestions for their improvement.

Preliminarily, it should be noted that the Commission's EEO rules have been extremely effective. According to the NOI, in 1992, 18.2% of all positions in the broadcast industry were held by minorities, a figure which approaches full parity with minorities' 21.8% representation in the U.S. labor force.^{8/} Similarly, 39.5% of broadcast industry employees were women, also a figure which approaches parity with women's 45.3% labor force representation. This broadcast industry employment record is particularly impressive when compared to more refined labor force statistics. According to the U.S. Census, minorities^{9/} constitute 13.8% and women constitute 45% of persons employed in managerial and professional specialties and technical, sales and administrative support

7/ (...continued)
Violations of the Broadcast EEO Rules, Policy Statement, 9 FCC Rcd 929 (1994) ["1994 Policy Statement"]), pets. for recons. and requests for clarification pending. For the convenience of the Commission, a copy of DL&A's petition for reconsideration and clarification is attached; it is specifically requested that this petition be acted upon in this proceeding if the Commission has not already done so.

8/ FCC, 1990 National Labor Force Statistics.

9/ Blacks, American Indians, Asians and other races.

occupations.^{10/} Given that these occupational categories involve qualifications similar to those required for employment in the broadcast industry, it is clear that the broadcast industry's minority and female employment record stands above that of other industries with similar employment requirements. These statistics confirm not only the effectiveness of the Commission's EEO regulations as they now exist, but also the commitment of the broadcast industry as a whole to the national policies underlying equal employment opportunity.

DL&A and its clients support the fundamental policy goals underlying the Commission's EEO rules. Non-discriminatory employment policies and practices are, properly, bedrock obligations. The agency's rules and their administration have, however, become mechanistic and wooden. The Commission has abandoned its early recognition^{11/} that fair employment practices will not necessarily result in proportionate minority or female employment. Current EEO enforcement fails to reflect practical realities of the employment marketplace and the unique employment needs of

^{10/} U.S. Department of Commerce, 1990 Census of Population, Social and Economic Characteristics, United States, Tables 20 and 45 (1990).

^{11/} See, e.g., Central States Broadcasting, Inc., 25 RR 2d 443 (1972); Taft Broadcasting Co., 26 RR 2d 269 (1972); RadiOhio, Inc., 26 RR 2d 327 (1972), aff'd sub nom., Columbus Broadcasting Coalition v. FCC, 505 F.2d 320 (D.C. Cir. 1974); KSAY Broadcasting Co., 30 RR 2d 936 (1974).

the broadcast industry. As a result, licensees have been left without affirmative regulatory guidance, which would be far more effective in accomplishing the rules' ultimate policy goals than the present penal enforcement environment.

Absent Congressional authority, the Commission may not change its present EEO rules and policies as they affect television licensees.^{12/} Notwithstanding that restriction, there are a number of changes in Commission policies in this area which could substantially improve the administration of those rules and thus contribute to enhancing equal employment opportunity in the broadcast industry.

Recruitment

The Commission seeks comment on ways it can better enable broadcasters to meet their EEO obligations. DL&A believes the Commission could make a major contribution by facilitating compilation and ready availability of information concerning effective sources of qualified minority and female job applicants. At present, the Commission requires licensees to contact a variety of organizations and educational institutions and imposes penalties on licensees which fail to do so. In such circumstances, the Commission has placed particular emphasis on what are in effect mandatory contacts with female- or

^{12/} Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ["1992 Cable Act"], § 22(f).

minority-specific organizations. Penalties are imposed even where contacts have been made if those contacts have been unproductive.

DL&A believes that these enforcement procedures are unfair and unwise. A licensee has absolutely no control over the responsiveness of the recruitment sources it contacts. Much depends on the serendipity of circumstance. Factors such as the availability of applicants with particular qualifications at particular times cannot be predicted or controlled.

In many cases, for example, licensees within a market will contact the same sources but will have varying degrees of success. Those licensees whose contacts fortuitously produced referrals may be able to avoid sanctions, while those which did not are penalized for using sources deemed ineffective. Basing EEO sanctions on the success -- or lack thereof -- of EEO contacts is, to put it bluntly, grossly unfair.

The organizations which the Commission requires licensees to contact, particularly the type of female- and minority-specific community organization it apparently favors, are simply not oriented toward employment placement or recruitment. Indeed, this is demonstrated by the experience of DL&A's clients and confirmed by review of Commission decisions and station license renewal

applications: stations frequently contact numerous female- and minority-specific organizations, including those which have been active in filing EEO-based petitions to deny, yet receive few, if any, female or minority referrals. Minority and female community organizations are simply not equipped to refer broadcast job applicants.

General recruitment sources which are expressly concerned with employment matters are frequently far more productive sources of female and minority referrals than minority- and female-specific organizations with no employment focus. Recruitment efforts such as advertisements in general circulation publications, local newspapers and industry trade magazines, as well as contacts with employment agencies and organizations with a specific professional orientation, are far more productive of qualified female and minority referrals than contacts with local community organizations. Similarly, contacts with educational institutions may be effective for entry-level positions, but not for positions which require substantial broadcast experience.

The Commission must recognize these realities of the employment marketplace, and reorient its enforcement procedures to an accurate evaluation of the likely productivity of recruitment sources. Reliance on general recruitment sources should not be penalized. Further, the

Commission could make a significant contribution to the ultimate effectiveness of its EEO policies by working with licensees and minority and female organizations in facilitating compilation and maintenance of a list of organizations which are likely sources of qualified minority and female job applicants.

Small Market Stations

The NOI also seeks comment on difficulties experienced by small market stations in satisfying their EEO obligations. Such difficulties are experienced not only by stations in small markets but also by small stations within or on the fringes of larger markets.

Small Market Stations. Small market stations must compete with those in larger markets both in terms of salary and in terms of the attractiveness of living conditions. It is, initially, often difficult to attract persons to smaller communities. Many small market stations must rely solely on the local labor force and cannot hope to attract individuals from outside the community.

Moreover, small market stations compete not only with larger broadcast stations: they must also compete with larger employers, including larger Fortune 500 companies, within their own markets. A small station with ten, twenty or even thirty employees simply cannot compete with larger local employers which can offer higher wages and greater benefits.

In sum, it is extraordinarily difficult for small market and small stations to locate and hire qualified minorities and women. It is thus extremely frustrating for such stations which have made consistent, good faith but fruitless efforts to recruit and hire minorities and women to nonetheless be penalized for their lack of success. It is not lack of commitment or efforts which is the problem. It is the fundamental economic realities of small station and small market operation.

Even if small stations can find and hire minorities and women, they typically do not stay long. Broadcast employees have great mobility, a factor which disadvantages small stations and markets. Larger market stations, facing the same regulatory imperatives as small market stations, are equally eager to hire minorities and women. Unlike small stations, they can offer attractive salaries and benefits. As a result, minorities and women may start their broadcast careers at small stations but quickly move on to more lucrative positions in larger markets.

DL&A suggests that the Commission recognize such stations' contribution by eliminating or reducing EEO sanctions for stations which can demonstrate actual efforts, regardless of results, and for stations which can demonstrate that they have provided substantial training

opportunities for minorities and women which have facilitated advancement within the broadcast industry.

Small Stations. Small stations also experience difficulties with respect to EEO compliance. Not only are they unable to pay salaries or offer benefits which are competitive with those offered by larger stations: the very real financial and time burdens associated with complete compliance with the paperwork burdens required by Commission's current EEO recordkeeping and reporting rules are proportionately greater for small stations where employees perform multiple functions than for larger stations. Moreover, the statistical analyses which control current Commission EEO enforcement efforts become meaningless mathematical games when the basic universe of employees is small.

Congress has recognized that employment-related regulations are excessively burdensome and can be counterproductive for small employers: most federal laws in this area have at least a 15-employee jurisdictional threshold. For example, Title VII of the 1964 Civil Rights Act applies only to employees with 15 or fewer employees;^{13/} the Office of Federal Contract Compliance only requires affirmative action plans (in many respects similar to FCC-required EEO Programs) from federal

^{13/} 42 U.S.C. § 2000e(b).

contractors if they have 50 or more employees;^{14/} the Age Discrimination in Employment Act applies to employers with 20 or more employees,^{15/} as does the Americans with Disabilities Act;^{16/} and the EEOC requires EEO-1 reports only from employers with 100 or more employees.^{17/} Given the Commission's obligation to act in a manner consistent with other federal policies,^{18/} DL&A urges the Commission to seek authority to similarly change the jurisdictional limits of its EEO rules to 15 or more fulltime employees,^{19/} or, alternatively, that it adopt different EEO processing guidelines for smaller stations having 15 or fewer fulltime employees.

Labor Force Statistics

Suburban Stations. DL&A urges the Commission to adopt more realistic definitions of the relevant labor market than its immutable reliance on MSA's. The Commission has historically offered little justification for selecting the MSA as the basis for the relevant labor market. MSA's

^{14/} 41 C.F.R. § 60-1.40.

^{15/} 29 U.S.C. § 630(b).

^{16/} 42 U.S.C. § 1211(5)(A).

^{17/} 29 C.F.R. § 1602.7.

^{18/} LaRose v. FCC, 494 F.2d 1145 (D.C. Cir. 1974).

^{19/} The Commission could change the jurisdictional limit for radio stations without further Congressional action.

are determined by the Office of Management and Budget, and are defined on several criteria, the principal consideration being population.^{20/} Significantly, the MSA is not defined with reference to broadcast stations' service areas or obligations, yet it is licensees' ascertainment and programming obligations which have long served as a predicate for the Commission's EEO regulations.^{21/}

In its early EEO decisions, the Commission indicated that it would defer to licensees' determinations concerning the relevant labor market. Nondiscrimination in Employment Practices of Broadcast Licensees, 23 FCC 2d 430, 433 (1970) ["...the licensee is in the best position to know the minority population in the service area and to respond accordingly."] Indeed, in at least three early EEO decisions, the Commission referred to the numbers of minorities in the "city" or "community," not the MSA. And in Scripps-Howard Broadcasting Co., 31 FCC 2d 1090 (1971), the Commission referred to the "community" as the relevant labor market, not the SMSA. Although two other early cases

^{20/} Revised Standards for Defining Metropolitan Areas in the 1990's, 55 Fed. Reg. 12154 (March 30, 1990).

^{21/} Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC 2d 766, 770 (1968) ["A refusal to hire Negroes or persons of any race or religion clearly raises a question of whether the licensee is making a good faith effort to serve his entire public. Thus, it immediately raises the question of whether he is consulting in good faith with Negro community leaders concerning programming [sic] to serve the area's needs and interests."]

relied -- without explanation -- on SMSA statistics,^{22/} a case decided shortly thereafter compared the licensee's minority employment to the black population within the city of license, the county and the SMSA, and concluded that it was within the range of reasonableness when compared to black representation in "the stations' service area."^{23/}

The Commission did not explicitly adopt the SMSA as the measure of the relevant labor market until 1974.^{24/} Significantly, however, it adopted that measure as the most accurate estimation of the station's "entire service area."^{25/} The agency's subsequent affirmation of this standard has been justified only by reference to unspecified "past experience."^{26/}

In light of the fundamental premise for Commission regulation of broadcast licensees' employment practices -- stations' public service programming obligations^{27/} -- it is patently unreasonable to arbitrarily require use of the MSA

^{22/} The Outlet Co., 38 FCC 2d 355, 366 (1972); Avco Broadcasting Corp., 39 FCC 2d 4, 9 (1972).

^{23/} RadiOhio, 38 FCC 2d 721, 746 (1973), aff'd sub nom., Columbus Broadcasting Coalition v. FCC, 505 F.2d 320 (D.C. Cir. 1974).

^{24/} United Church of Christ, 44 FCC 2d 647 (1974).

^{25/} Id. at 652.

^{26/} 1976 Report, supra, 60 FCC 2d 226, 236 (1976).

^{27/} NAACP v. FPC, 425 U.S. 622, 670, n. 7 (1976); 1970 Report, supra; 1976 Report, supra; 1987 EEO Report, supra.

standard in circumstances in which it does not accurately represent a station's actual service area. Indeed, use of a standard which does not reflect the area within which a station provides responsive programming destroys the critical policy justification for the Commission's EEO rules. Preservation of the integrity of its EEO rules thus requires that the Commission clarify that stations whose service contours differ substantially from the area within the MSA in which they are located may use the labor force within their actual service area as a measure of their relevant recruitment areas.

Refined Labor Force Statistics. DL&A urges the Commission to adjust the labor force statistics used in evaluating licensees' EEO programs based upon showings which demonstrate that portions of the relevant minority and female labor force lack qualifications necessary for broadcast industry employment.^{28/}

The Supreme Court has expressly approved use of particularized labor force statistics.^{29/} At one time, the Commission, too, acknowledged the importance of considering

^{28/} Such showings might include, for example, a demonstration that a significant proportion of area minorities and women lack a high school education or do not speak English.

^{29/} Wards Cove Packing Co. v. Antonio, 109 S.Ct. 2115 (1989); see also City of Richmond v. J. A. Croson Company, 488 U.S. 469 (1989).

the skills of women and minorities within the workforce.^{30/} More recently, the Commission has, without explanation,^{31/} changed its position. It has flatly refused to consider more refined labor force statistics, based upon the claim that it is not engaging in Title VII EEO enforcement and that its analysis is tied to EEO efforts rather than statistics.^{32/}

However, Wards Cove's directives concerning the integrity of statistical analyses are equally applicable to the type of rigid statistical analysis the Commission now uses in enforcing its rules, and there is no logical reason -- nor has the Commission suggested one -- why the Commission should reject more precise labor force definitions. The Commission's claims that its analysis is tied to EEO efforts does not justify rejection of particularized labor force statistics in an enforcement environment in which statistical analysis is, in practice, the overriding principle of regulatory decisionmaking.

Significant Minorities. The Commission has indicated that although in most instances, it will not

^{30/} Equal Employment Opportunity Guidelines, 79 FCC 2d 922, 932 (1980).

^{31/} The Commission cannot change its policy without an adequate explanation thereof. Bechtel v. FCC, 957 F.2d 873, 881 (D.C. Cir. 1992).

^{32/} See, e.g., Sun Mountain Broadcasting, Inc., FCC 94-105 (April 28, 1994).

inquire into licensees' employment practices on a per-minority basis, it will nonetheless engage in such analysis in circumstances involving "significant" minorities. Quite apart from the lack of definition of the term "significant minority," this regulatory approach lacks logic: the Commission is in effect saying that at some point a minority is so much of a minority that it does not merit regulatory protection. If, for example, a labor force consisted of 20% of minority A, 20% of minority B and only 2% of minority C, and all of a station's minority employees were minority C, the Commission's current regulatory policies would require investigation and possible sanction. Yet the licensee in question would still be advancing the cause of equal employment opportunity by hiring minority persons, and arguably is doing so to a greater extent than other licensees which employ large numbers of minorities A and B because it has hired members of an exceedingly small minority.

DL&A respectfully submits that if the ultimate goal of the Commission's EEO rules is enhancement of employment opportunities for members of minority groups and women, then their enforcement should make no distinctions between various minority groups.

Parttime Employees

Compliance with the Commission's EEO rules can be an expensive proposition. One DL&A client in a smaller market estimated, for example that costs of advertising, postage, telephone, supplies, and similar items necessary to conduct required EEO outreach for a single job vacancy exceeded \$500; this figure would be substantially higher in a larger market. Although such expenditures may be justified in the case of a fulltime employee with long term prospects, they represent a costly, counterproductive burden in the case of parttime employees.

At the same time, however, parttime employment can serve as an important training vehicle and a means of entry into the broadcasting business for minorities and women. Particularly in the radio industry, parttime employees play a significant role in stations operations. The nature of the radio industry, involving specialized formats and programs, and requiring both weekend as well as Monday-Friday technical operational shifts, lends itself to parttime employment.^{33/} A radio station's use of parttime

^{33/} For example, the NAB/BCFM 1990 Radio Financial Report indicates that in 1989, an average of 6 of 21 (28.6%) employees at radio stations in markets with 100,000 - 250,000 population were parttime employees. The figures are similar for stations in markets over 2.5 million (29.6% parttime employees); 1 - 2.5 million (25.7%); 500,000 - 1 million (25.8%); 250,000 - 500,000 (29.2%); 50,000 - 100,000 (35.3%); 25,000 - 50,000 (35.7%); and under 25,000 (41.7%).

employees thus reflects the nature of work at a radio station, not any attempt to minimize employment opportunities. Parttime employees play critical roles in radio station operations.

Further, in many situations, stations may hire two parttime employees to replace one fulltime employee. This permits combining of schedules to facilitate better coverage (for example, scheduling with different lunch hours to eliminate the need for temporary relief coverage or to facilitate coverage in the event of illness). Moreover, parttime employment can also be a steppingstone to fulltime positions or to positions in other media, particularly television. A parttime employee has an opportunity to learn about various jobs at a station, and the station can learn about the employee's skills in light of future employment opportunities. Similarly, parttime employment often offers a means by which a station can accommodate employees' particular personal needs.

DL&A suggests that an appropriate balance of these considerations would be for the Commission to discontinue its detailed regulation of parttime broadcast station employment, particularly insofar as that regulation now requires extensive EEO outreach efforts for each parttime position which is filled. The FCC Form 395-B and the renewal application should request information only